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No. 09-28

In the Supreme Court of the United States

JACK E. EASTERDAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether financial hardship is a valid defense to a criminal charge under 26 U.S.C. 7202 for failure to pay over federal payroll taxes.

2. Whether necessity may be a defense to federal criminal charges.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Cheek v. *United States*, 498 U.S. 192 (1991) 7
Dixon v. *United States*, 548 U.S. 1 (2006) 8
Spies v. *United States*, 317 U.S. 492 (1943) 4
United States v. *Andros*, 484 F.2d 531 (9th Cir. 1973) 4
United States v. *Ausmus*, 774 F.2d 722 (6th Cir. 1985) 4, 5, 6
United States v. *Baker*, 523 F.3d 1141 (10th Cir.), cert. denied, 129 S. Ct. 349 (2008) 8
United States v. *Boyle*, 469 U.S. 241 (1985) 7
United States v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) 8, 9
United States v. *Poll*, 521 F.2d 329 (9th Cir. 1975) 3, 4
United States v. *Pomponio*, 429 U.S. 10 (1976) 4, 6
United States v. *Tucker*, 686 F.2d 230 (5th Cir.), cert. denied, 459 U.S. 1071 (1982) 4, 5
Wisniewski v. *United States*, 353 U.S. 901 (1957) 5

Statutes and regulations:

26 U.S.C. 6651 ..... 5, 6, 7
26 U.S.C. 6651(a) 7

Statutes and regulations—Continued: Page

26 U.S.C. 6651(a)(2) 7
26 U.S.C. 6656 ..... 5, 7
26 U.S.C. 6656(a) 7
26 U.S.C. 7202 ..... *passim*
26 C.F.R.:
Section 1.6161-1(b) 7
Section 301.6651-1(c) 7, 8

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 564 F.3d 1004.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2008. A petition for rehearing was denied on April 27, 2009 (Pet. App. 2a). The petition for a writ of certiorari was filed on July 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on 107 counts of willful failure to pay over payroll taxes, in violation of 26 U.S.C. 7202. Petitioner was sentenced to 30 months of imprisonment, to be fol-

lowed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-26a.

1. Petitioner owned and operated nine nursing homes in Northern California through a parent corporation. Petitioner was also a 50% shareholder in a business that developed software for the nursing home industry. Under federal law, an employer must withhold from an employee's wages federal income tax and the employee's share of Social Security tax and Medicare tax, which are collectively referred to as trust-fund or payroll taxes. Although petitioner's companies' tax filings accurately reported their tax liabilities, petitioner, through the businesses, failed to pay over the full amount of tax due to the Internal Revenue Service (IRS). The total payroll tax liability for all of the companies petitioner controlled for the period from the fourth quarter of 1998 through the fourth quarter of 2005 was $44,864,162, of which $26,018,869 was paid. Pet. App. 4a; Gov't C.A. Br. 3-4.

The IRS sent numerous letters to petitioner's companies requesting payment of the delinquent taxes. When no payment was forthcoming, the IRS sent notices of intent to levy against each company's assets. The IRS also assessed liens against corporate accounts. Although petitioner accepted responsibility for the tax delinquency, his pattern of nonpayment continued. Pet. App. 4a-5a; Gov't C.A. Br. 5-7.

2. On December 8, 2006, the government filed a superseding information charging petitioner with 109 counts of willful failure to pay over trust-fund taxes, in violation of 26 U.S.C. 7202. At trial, petitioner did not dispute that he had failed to pay the taxes when due. Instead, his defense was that he lacked the financial ability to comply with his tax obligations. Although the

district court ruled that ability to pay was not relevant, petitioner put on testimony to the effect that he did not pay over the payroll taxes to the IRS because he instead used the funds to pay other bills in order to keep the nursing homes operational. Pet. App. 4a-5a; Gov't C.A. Br. 7.

Petitioner asked the district court to instruct the jury that to meet its burden of proving that he willfully failed to pay over the payroll taxes, the government must prove that he had the ability to pay at the time the taxes were due. Petitioner's proposed instruction was drawn from *United States* v. *Poll*, 521 F.2d 329, 333 (9th Cir. 1975), which he argued had held that ability to pay was an element of willfulness under 26 U.S.C. 7202. Pet. App. 5a-6a; Gov't C.A. Br. 13. The district court refused to give the proposed instruction, concluding that *Poll* was no longer binding precedent. Pet. App. 41a-45a. The district court, however, did instruct the jury that the government had the burden of proving that petitioner did not have a good-faith belief that he was complying with the tax law. *Id.* at 6a. The jury found petitioner guilty on 107 of the 109 counts in the superseding information. *Id.* at 7a; Gov't C.A. Br. 2-3.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-26a.

The court of appeals, like the district court, concluded that the decision in *Poll* was no longer binding precedent and that the district court therefore correctly refused to instruct the jury using petitioner's proposed instruction. Pet. App. 7a-17a. Although the court acknowledged that it had stated in *Poll* that the willfulness element of 26 U.S.C. 7202 required the government to prove that "at the time payment was due the taxpayer possessed sufficient funds to enable him to meet his obli-

gation or that the lack of sufficient funds was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances," *Poll*, 521 F.2d at 333, the court held that *Poll* had effectively been overruled by *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam). Pet. App. 9a. It explained that the holding in *Poll* "regarding ability to pay relied upon a definition of willfulness, taken from *Spies* [v. *United States*, 317 U.S. 492 (1943)] and [*United States* v.] *Andros* [, 484 F.2d 531 (9th Cir. 1973)], that included an element of 'evil motive.'" Pet. App. 9a (citation omitted). The court further explained that the *Pomponio* Court had "repudiated this formulation of willfulness," *id.* at 9a-10a, and that "[a]fter *Pomponio*, * * * there is no longer any requirement of evil motive, upon which *Poll*'s holding rested," *id.* at 13a.

The court of appeals also quoted with approval language in decisions from the Fifth and Sixth Circuits, *United States* v. *Tucker*, 686 F.2d 230, 233 (5th Cir.), cert. denied, 459 U.S. 1071 (1982), and *United States* v. *Ausmus*, 774 F.2d 722, 725 (6th Cir. 1985), each of which had rejected the holding in *Poll*. According to the court, *Tucker* and *Ausmus*, using "unassailable logic," each held that to make the financial ability to pay the tax when due a prerequisite to criminal liability invited recalcitrant taxpayers to spend income as fast as it was earned in order to evade criminal liability while not paying taxes. The court rejected as "inconsistent with common sense" allowing a defendant to defend a failure to pay case under 26 U.S.C. 7202 "on the ground that he had spent the money for other expenses." Pet. App. 14a-15a.

Judge Smith dissented. He agreed that *Poll* is "bad law," but believed that it remained controlling circuit precedent. Pet. App. 18a-26a.

ARGUMENT

Petitioner contends (Pet. 6-11) that review is necessary to resolve a conflict between civil tax cases, some of which have recognized inability to pay as a defense to civil tax penalties for failing to pay taxes under 26 U.S.C. 6651 and 6656, and criminal tax cases, all of which now agree that inability to pay is not a defense to charges under 26 U.S.C. 7202. Petitioner also contends (Pet. 11-15) that review is warranted to settle the question whether, in the absence of direction from Congress, defendants may assert a common-law defense of necessity to federal criminal offenses. Those contentions lack merit and do not warrant further review.

1. a. All the courts of appeals that have considered the question now agree that there is no inability-to-pay defense to criminal tax charges. See Pet. App. 1a-26a; *United States* v. *Ausmus*, 774 F.2d 722, 725 (6th Cir. 1985); *United States* v. *Tucker*, 686 F.2d 230, 233 (5th Cir.), cert. denied, 459 U.S. 1071 (1982). Indeed, the decision below eliminated the preexisting conflict between the Ninth Circuit and the other circuits. Pet. App. 14a-15a. Petitioner does not contend otherwise.[1] There is thus no longer any conflict among the courts of appeals on the interpretation of the willfulness requirement in 26 U.S.C. 7202.

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[1] To the extent petitioner relies on any remaining tension among Ninth Circuit precedents, that intra-circuit tension does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

The prevailing interpretation is consistent with both Supreme Court precedent and common sense. In *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam), this Court clarified that the willfulness element in criminal tax cases did not require "proof of any motive other than an intentional violation of a known legal duty," specifically rejecting the notion that it required some additional "evil motive." *Id.* at 11-12. As the court of appeals noted, a contrary interpretation—one considering a taxpayer's ability to pay—would be "inconsistent with common sense." Pet. App. 14a. "Otherwise, a recalcitrant taxpayer could simply dissipate his liquid assets at or near the time when his taxes come due and thereby evade criminal liability." *Tucker*, 686 F.2d at 233; accord *Ausmus*, 774 F.2d at 725.

b. Petitioner instead points (Pet. 7-8) to what he characterizes as a "complicated * * * division of authority" on the distinct question whether an inability to pay taxes may constitute "reasonable cause" to waive imposition of civil penalties under 26 U.S.C. 6651 and 6656. According to petitioner, the civil cases that permit abatement on inability-to-pay grounds are logically incompatible with the separate line of criminal cases (including the decision below) involving 26 U.S.C. 7202.

As an initial matter, this *criminal* tax case is not an appropriate vehicle to resolve any conflict among the courts of appeals on the proper standard for liability in *civil* tax cases governed by different statutes. As to the purported conflict between the criminal cases and certain of the civil cases, any differences are attributable to the text of the respective statutes.

Section 7202, the criminal statute, covers "[a]ny person * * * who willfully fails to * * * pay over" federal taxes. 26 U.S.C. 7202. To establish willfulness, the

government must prove that the taxpayer voluntarily and intentionally failed to pay over the tax and knew that what he was doing was illegal. See *Cheek* v. *United States*, 498 U.S. 192, 201 (1991) (willfulness element in criminal tax statutes "requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty"); see also p. 5, *supra* (collecting circuit cases).

The civil provisions (Sections 6651 and 6656), by contrast, provide for civil penalties upon a showing of "willful neglect" and expressly provide a "reasonable cause" defense absent from the text of Section 7202. See 26 U.S.C. 6651(a)(2) (imposing civil penalty on failure to pay tax "unless it is shown that such failure is due to reasonable cause and not due to willful neglect"); 26 U.S.C. 6656(a) (same). This Court has defined "willful neglect" under Section 6651(a) as the taxpayer's "conscious, intentional failure or reckless indifference," *United States* v. *Boyle*, 469 U.S. 241, 245 (1985)—a lesser showing than willfulness under Section 7202. Treasury regulations provide that the statutory "reasonable cause" defense to civil penalties is available if the taxpayer "has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in § 1.6161-1(b) of this chapter) if he paid on the due date." 26 C.F.R. 1.6651-1(c).

There are thus at least two reasons that explain any discrepancy between treatment of failure to pay in criminal and civil tax cases: (1) the civil statutes prescribe a lower threshold for liability ("willful neglect" rather than willfulness); and (2) the civil statutes, unlike the

criminal statute, provide for an explicit "reasonable cause" defense.

c. In any event, the anomaly posited by petitioner—that a taxpayer could have a defense to civil penalties yet still be criminally liable for the same nonpayment—does not exist on the facts of this case. Petitioner's inability-to-pay defense would not prevail even under the standard for civil liability (see p. 7, *supra*). Petitioner has failed to point to any proffered evidence showing that he had exercised "ordinary business care and prudence" to ensure that he would be able to pay his taxes but was unexpectedly frustrated in his efforts. 26 C.F.R. 1.6651-1(c). Petitioner's different argument—that he is entitled to forgo paying the taxes owed in order to use those funds to keep his business afloat (Pet. 3)—would not satisfy the civil provision's "reasonable cause" defense.

2. Petitioner also argues (Pet. 11-15) that the instant petition offers this Court a vehicle to recognize a necessity defense not only to criminal tax offenses in particular but also to federal crimes in general. The Court has previously assumed that a duress defense is available in various statutory contexts, see *Dixon* v. *United States*, 548 U.S. 1, 13 & n.7 (2006), but has also declined to recognize the defense when it is incompatible with the offense at issue, see *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491-494 (2001) (citations omitted). Although petitioner claims that this Court's "failure to take a clear stand on the necessity defense has created confusion and uncertainty in the lower courts," he cites only one judicial opinion—a dissent from a denial of rehearing en banc—in support of that contention. Pet. 13 (citing *United States* v. *Baker*, 523 F.3d 1141, 1142 (10th Cir. 2008) (McConnell, J., dissent-

ing)). In any event, for reasons unique to 26 U.S.C. 7202, there is no dispute among the courts of appeals that no necessity defense is available to a criminal charge for failure to pay taxes. See pp. 5-6, *supra*. That conclusion is entirely consistent with ths Court's holding in *Oakland Cannabis*, 532 U.S. at 493-495 (rejecting defense when at odds with the terms and structure of the statute). Accordingly, even if there were a need for this Court's intervention, this case does not provide an appropriate vehicle to address the broader question of when the common-law necessity defense is available to federal crimes generally.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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